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AMENDING THE CONSTITUTION.

In and out of Congress, in the secular press, and even in legal publications, the right of Congress to propose amendments to the Constitution is discussed and questioned. At the meeting of the American Bar Association at Cleveland, August last, a very acrimonious debate grew out of a resolution condemning the submission of the prohibition and woman suffrage amendments to the Constitution.

Many persons object to any amendment of the Constitution. That venerable instrument is properly regarded as a thing sacred to the memory of the Fathers who founded the Republic; hence many persons look upon it as a veritable Ark of the Covenant, which unholy hands must not so much as touch or disturb. Others who would not be willing to take such an ultra conservative position still point out that the Constitution was intended to be a Great Charter of general rights of the people and broad limitations upon governmental action; that it, therefore, should not be encumbered with provisions regulating morals or which have to do wholly with matters of merely local concern.

What does the Constitution itself declare with respect to its own amendment? Article V provides that "the Congress, whenever two-thirds of the members of both Houses shall deem it necessary, shall propose an amendment to the Constitution."

This power to propose amendments is unlimited as to the time when an amendment shall be proposed, the character of the proposed amendment or the conditions under which such amendment may be submitted. The only doubt that seems to have arisen in the minds of some senators is with respect to their own responsibility in the matter. The Constitution declares that whenever two-thirds of the members of both houses shall *"deem it necessary."* What is meant by this? Suppose a member of either House believes in woman suffrage as a political doctrine, but does not believe the subject to be one for federal cognizance, or does not believe that the time is ripe or propitious, may he properly vote against the proposition to submit a suffrage amendment to the Constitution? Or, on the other hand, suppose a member is personally opposed to prohibition as a political doctrine, but is willing to admit that the legislature of his state desires the right to vote on the subject of such an amendment to the Constitution, or suppose he is confident that if such an amendment were submitted it would be promptly adopted by the states, owing to peculiar conditions then existing, would he violate his oath to support the Constitution by voting in favor of the submission of such amendment?

The questions just propounded are, of course, largely personal with each member of Congress, but it is interesting to follow the views of congressmen respecting their obligation and responsibility to submit such amendments. Senator Gallinger contended, in the debate on the suffrage amendment, that the Constitution required every senator to vote his own convictions as to the merits of the amendment, while other senators insisted that they were under obligations to vote to submit amendments for which there was a widespread popular demand.

With respect to the argument that the Constitution should not be further amended or at least should only be amended to enlarge or restrict its general powers and limitations, bar associations ought to be very careful how far they allow themselves to go in such direction. In the successful opposition interposed by the bar of the country to the propaganda for the recall of judges and judicial decisions, the argument was continually insisted up-

on that if the people were not satisfied with the decision of a court holding that a certain law violated the Constitution, it was always possible for them, by the orderly processes of law, to amend their Constitution in any way they saw fit. It will not do for lawyers now to say to the people when some popular reform has been rendered impossible of accomplishment by some provision of the Constitution that their effort to amend the Constitution to make their reform possible would be an improper and dangerous method of political procedure. As citizens, lawyers may well argue that the particular reform itself is improper and inexpedient, but to attempt to put insuperable barriers in the way of any such reform would undermine the people's confidence in the sincerity of the profession.

The lawyer is properly regarded as one of the leaders of public opinion in his community. On legal and political subjects, his advice is frequently consulted by his fellow citizens. His conservatism has done much to steady our youthful and vigorous democracy in times of great excitement. He is the one who always counsels moderation and careful public consideration of all proposed changes in the law, but he is always careful, if he is wise, never to question, as a lawyer, the supreme power of the sovereignty of the people, not only under, but over the Constitution.

Still another question has been debated. How many votes are necessary to submit an amendment to the Constitution? Article V declares "two-thirds of the members of both Houses." Does this mean two-thirds of those elected or two-thirds of a quorum? We should incline personally to favor the former interpretation if the latter interpretation had not been given to it by the Congress itself and by public acquiescence ever since the Constitution was adopted. The very first Amendment to the Constitution was voted for by thirty-seven members of the House of Representatives, which was composed of sixty-five members elect. In 1898 the amendment providing for election of United States senators by the people passed the House by a vote of 184 to 11, which was not two-thirds of the House membership. On a point of order being made the speaker, in declining to sustain the point of order, said: "The question is one that has been so often decided that it seems hardly necessary to dwell upon it. The provision of the Constitution says 'two-thirds of both Houses.' What constitutes a House? A quorum of the membership, a majority, one-half and one more. That is all that is necessary to constitute a House to do all the business that comes before the House. Among the business that comes before the House is the reconsideration of a bill which has been vetoed by the President; another is a proposed amendment to the Constitution; and the practice is uniform in both cases that if a quorum of the House is present, the House is constituted and two-thirds of those voting are sufficient in order to accomplish the object."

We have not the space here to discuss the question raised by the provision in the proposed prohibition amendment giving "concurrent power to Congress and the several states to enforce this article by appropriate legislation." Here is a very unusual provision and lawyers and bar associations have called attention to much possible confusion of state and federal authority which this provision will cause. Here is indeed a proper subject upon which lawyers should be free to give their opinion in order to prevent in time any serious conflict that may flow from such a provision. It is easy to see why it was put in: to prevent the argument being advanced that the passage of the amendment would deprive the states of power to regulate or prohibit the liquor traffic. This argument would probably have defeated ratification.

These are some of the interesting questions being raised and discussed respecting amendments to the Constitution. In this

day of reconstruction it is not unlikely further changes will be proposed. Lawyers must be careful on the one hand not to oppose such changes simply because they are changes, nor on the other hand, to be indifferent to such changes which they know will likely result disastrously.

A. H. R.

NOTES OF IMPORTANT DECISIONS.

TRADE UNIONS—LIABILITY FOR ACTS OF MEMBERS PICKETING PLACE OF BUSINESS.—In local Union No. 313 Hotel and Restaurant Employees v. Stathakis, 205 S. W. 450, decided by Arkansas Supreme Court, it was held that officers of a voluntary association organized as a labor union were liable for acts of intimidation or coercion of pickets exerted against patrons of a store, so as to prevent the latter from resorting there for purposes of business and for the maintenance of such a force of pickets they could be enjoined.

The opinion in this case goes into quite an extensive review of decisions by courts, their earlier and later view and it reaches the conclusion that:

"The modern and better view on the subject appears to be that, while the labor union which is on a strike has the right to give publicity to the fact and to solicit support in its behalf, it has no right, in doing so, to disregard the equal right of the employer to employ whom he pleases, provided he violates no contract right of employment, and that the public may bestow its favor and support upon one side or the other free from any coercive molestation."

Speaking particularly as to the latter phase of such a matter and to the situation in the instant case it was further said:

"The labor union or its representatives and employes had the right to exhibit the placards in question to the public, but it is a far different thing to say that the right to exhibit these placards to the public carried with it the right to patrol or picket appellee's places of business with these placards as to interfere with his lawful business."

As to how this picketing may thus interfere the court further says, as speaking to the case as made by the evidence:

"A presentation of labor's grievances elsewhere gives the members of the public whose support is thus solicited an opportunity of reflection; but when the picketing is conducted in the small space of the frontage of the places picketed, the effect of that conduct is practically immediate. No opportunity for reflection is afforded. One must choose immediately between defying a picket and acceding to his appeal, so that interference necessarily results to the business there being conducted. We conclude, therefore, that the decree of the court enjoining the picketing under the conditions stated is right and proper and should be affirmed."

This sounds like wholesome doctrine, and the court might have gone further and asserted the right of a business fronting on a street to have access thereto not substantially interfered with, such right being in strict accord with the purposes for which streets are laid out, dedicated and maintained. And this in no way takes into necessay view the right of those on the street to obtrude upon the attention of pedestrians matters wholly foreign to legitimate use of a highway. Even peddlers and hucksters legitimately using streets may be required to secure licenses.

COMMERCE—JURISDICTION OF PUBLIC SERVICE COMMISSION TO REGULATE RATES CHARGED FOR NATURAL GAS PIPED INTO STATE—Re Pennsylvania Gas Co., 171 N. Y., Supp. 1028, decided by Appellate Division of New York Supreme Court, it was held that the State Public Service Commission had jurisdiction to regulate rates to be charged local consumers for natural gas piped from another state.

This question was considered in 86 Cent. L. J. 260, in an article under the title: "Sales and Deliveries of Articles in Interstate Commerce — Losing or Retaining their Interstate Character," and the conclusion was there drawn that to use a franchise under state control for distribution to customers not ascertained previous to shipment in interstate commerce, constituted a mingling of an article into the mass of property subject to state control. It made a "rest," taking the article from under the shelter of the commerce clause.

The instant case, which concerned natural gas piped from Pennsylvania into New York and then sold to consumers in a city, held that notwithstanding this gas was piped from another state, yet it was "characteristically and peculiarly a local product," and so came under state control.

While we agree with the conclusion stated, yet it seems curious to call this foreign product a local product. Essentially it was the very reverse of this. But it had appealed to

local means for distribution and we think by the use of such means it took on the status of a local product.

This was just as if the foreign product arriving in bulk into another state and, with no identification of customers to whom it is to be delivered, the owner of the product uses local means both to ascertain the customers and to effect deliveries to them. Even in cases where installation of machinery shipped in interstate commerce is to be done by local work, this has been held to take it out of the commerce clause. A fortiori, it seems to us would this be true, where resort must be had to local agencies, and even to state franchises, to effect sales and distribution.

SPECIFIC PERFORMANCE — CONTRACT TO FORM CORPORATION AS A MEANS OF MERGING SEPARATE BUSINESSES OF INCORPORATORS.—It not infrequently happens that some of the parties agreeing to form a corporation and turn their respective plants and services over to the new corporation, refuse to complete the contract and the question arises what remedy have the incorporators against those who refuse to come in. A recent decision by Judge Staake of the Philadelphia Common Pleas Court holds that specific performance is not the remedy, for the reason that the furnishing of neither specific property nor personal services can be coerced unless such property or services have a unique or peculiar value. International Auto Parts Co. v. Abel, 75 Leg. Int. 582.

In this case parties having separate automobile businesses and plants entered into an agreement to create a corporation to take over the separate businesses of the incorporators. The contract provided for the selection of three appraisers to inventory and appraise the stock, fixtures and equipment of the plants; that the stock, fixtures and equipment should be taken over by the corporation at the appraised value; and that the incorporators should devote their services in various capacities to the corporation. The corporation was duly formed. Two of the parties to the original agreement took no part in the organization of the corporation, and refused to transfer their plant as required by the agreement, and continued to operate it in competition with the corporation. A bill was filed against them by the corporation for specific performance. Held, on demurrer, that equity could not enforce specific performance of that part of the contract which required the rendering of personal service by the incorporators to the corporation, as there was no averment that such services were of a unique or peculiar value, and it was evident that there was no harmony between the parties and they could not work well together; that the plaintiffs' remedy was by action at law for failure to transfer stock, fixtures and equipment.

Judge Staake, in his opinion, says: "So far as the services of the defendants are concerned, we are persuaded that we cannot enforce such a contract for services for the reasons presented by the learned counsel for the defendant, namely:

(a) Such a contract is only enforceable in equity when such services have a peculiar or unique value which can be supplied by no one else, and there is no averment in the bill that the defendants' services have any such unique or peculiar value, citing Philadelphia Ball Club v. Lajoie, 202 Pa. 210.

(b) Such a contract is lacking in mutuality. No consideration is provided for the services to be rendered. If the defendants were seeking specific performance of the contract, there is nothing definite for which they could ask; they could not obtain a decree, and therefore, the plaintiffs are not entitled to a decree against them: Ballou v. March, 133 Pa. 64.

(c) A court of equity would not enforce such a contract for services, because it is evident that there could be no harmonious relations between the parties, and, as was said in Ewing's Appeal, 18 W. N. C. 29, equity will not enforce a contract which is practically a partnership with persons between whom there could be no harmonious relations in any business enterprise.

So far as the plaintiffs' bill demanded the transfer of the stock in trade to the plaintiff corporation, counsel for defendants earnestly contended this was 'certainly unenforceable;' that equity would not enforce a contract of sale of personal chattels unless the articles had a unique or special character, and there was nothing in the present bill to show that articles such as these could not be purchased in the open market. There is an utter failure to specify what constituted what is called the 'entire equipment' of the respective parties. It would apparently be an absolute impossibility for a chancellor to decree a transfer of chattels or articles of personal property when there is no specific information in the bill filed as to the nature, character or even the number of such articles as make up such "entire equipment."

SOLICITOR ACTING AS TRUSTEE.

Sometimes a testator specially desires that his legal adviser should not only act as the solicitor under his will, but also as one of his trustees; and again it is frequently to a solicitor's own professional interest to be a trustee, as he thereby usually obtains a determining voice in the solicitorship of the trust. In either case a solicitor acting as a trustee and also being paid for professional services to the trust comes into conflict with the principle that a person in a position of trust cannot be *auctor in rem suam.*

Not to cite any further authority this principle will be found enforced and explained by Lord Chancellor Cranworth in the English case of Broughton v. Broughton,[1] and his statement of it has ever since been accepted as practically the last word on the matter. "The rule applicable to the subject has been treated at the bar as if it were sufficiently enunciated by saying, that a trustee shall not be able to make a profit of his trust; but that is not stating it so widely as it ought to be stated. The rule really is, that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty; and a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them. As the trustee might make the payment to others, this court says he shall not make it to himself; and it says the same in the case of agents, where they may employ others under them. The good sense of the rule is obvious, because it is one of the duties of a trustee to take care that no improper charges are made by persons employed for the estate. It has been often argued that a sufficient check is afforded by the power of taxing the charges, but the answer is this, that that check is not enough, and the creator of the trust has a right to have that, and also the check of the trustee."

In consequence, in order to permit of a testator's law adviser acting as his trustee and for other motives, clauses expressly permitting him to receive the usual remuneration came to be almost invariably inserted. These clauses have, however, been adversely commented on twice by Mr. Justice Kay,[2] his latest dictum being: "I wish to say on my own behalf that when a solicitor trustee himself prepares a document containing a clause of that kind in his own favor, he must not be surprised, if, when the matter comes before the court, the court is inclined to watch very jealously indeed his conduct as solicitor and trustee under the clause."

Notwithstanding the obvious intention of these clauses, which is to place the trustee agent in the same position as if he were not a trustee, yet in England, they have come to be regarded as conferring a benefit; in other words, as being of the nature of a legacy. Certain consequences which are not beneficial to the solicitor trustee follow from this. If the estate is insufficient for payment of the pecuniary legacies in full, then, in default of any direction to the contrary, they all abate. Mr. Justice Eve has accordingly lately held[3] that the solicitor's profit costs must abate among the other legacies. This case is very similar to that of Re White,[4] where the Court of Appeal decided that, the testator's estate being insolvent, the solicitor trustee could not claim any profit costs until the creditors were satisfied, as the declaration made by the testator was bounty on his part. Another consequence is that neither the solicitor trustee nor his wife must attest the execution of the will, or the clause will be null and void under sect. 15 of the Wills Act, 1837. In Re Pooley,[5] the Court of

(1) 1855, 5, De. Gex M. & G. 160.

(2) Re Chappel, 27 Ch. Div. 584; and in Re Fish, 1893, 2 Ch. 413.

(3) Re. Brown, 1918 L. T. J., p. 441.

(4) 78 L. T. Rep. 770 (1898); 2 Ch. 217.

(5) 60 L. T. Rep. 73; 40 Ch. Div. 1.

Appeal so decided, Lord Justice Cotton saying: "It is urged that it is not a gift, for that he has to work for what he receives. That is true, but the clause gives him a right which he would not otherwise have to charge for the work if he does it, and that, in my opinion, is a beneficial gift within the meaning of the section."

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THE POLICE POWER OF CONGRESS UNDER AUTHORITY TO REGULATE COMMERCE.

Introductory.—Professor Freund, in his work on Police Power (Sec. 66), says that "it is impossible to deny that the federal government exercises a considerable police power of its own."

In a recent case arising under the Mann Act, the Supreme Court said: "There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the states cannot reach and over which Congress alone has power; and if such power be exerted to control what the states cannot, it is an argument for—not against—its legality."[1]

The power to regulate interstate commerce is a police power. This is true, whether the business subject to regulation is of a private or of a quasi-public nature; because the distinction between the two depends merely upon the situation of the public with respect to it.[2]

The fact that the Lottery Case, cited post, was grounded on the police power, is indicated in a dissenting opinion in that case written by Mr. Chief Justice Fuller, and concurred in by three other of the justices, in which it was said: "The power of the state to impose restraints and burdens on persons and property in conservation and promotion of the public health, good order and prosperity is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive, and the suppression of lotteries as a harmful business falls within this power, commonly called of police. * * * To hold that Congress has general police power would be to hold that it may accomplish objects not entrusted to the general government."

The exercise of the police power "aims directly to secure and promote the public welfare."[3]

The more common objects of its protecting influence are the public health, the public safety, and the public morals. All governmental regulation having for its purpose the protection of these, or any one or more of them, is an exercise of the police power. Whatever tends directly and fairly to promote the general or public welfare is a legitimate exercise of this power.

Nature and scope of the power.—When the power to regulate commerce resided in the states it could have been exercised by them in the same way and for the same purpose that they exercise the police power in respect of any other subject of regulation.

Opinion has been expressed by some that it was not intended to confer upon Congress the power to regulate interstate commerce for the welfare of the public morals, etc. In this respect it should be borne in mind that the police power is one indefinable right or power, and that it is not parceled off into sections, one section

(1) Hoke v. United States, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913 E., 905.

(2) Wyman, Pub. Serv. Corp., § 36.

(3) Freund, Pol. Pow., § 3.

being the power to regulate commerce, another the power to regulate something else, and so on. The subject in respect to which it is exercised may be divided and subdivided, but not so as to the power. In the instant case the power to regulate a particular kind of business was granted to Congress, and this includes the right to exercise all the police power in respect of it.

The power lost nothing, either in character or scope, in the process of being transferred from state to federal sovereignty. What passed by the grant was the exclusive right to exercise *the* police power in respect of a specified kind of commerce. Not the right to exercise a portion of the police power, but the right to exercise *the* police power in respect of a given subject of regulation.

The police power is no different when exercised by the federal government than when exercised by the states, and it is subject to no greater limitations. It is still that power to be exercised for the public welfare, i. e., the public health, safety, morals, etc. The only limitation on its exercise by the federal government is contained in the grant, and relates to the subject of regulation, and not to the power over that subject.

There is not any difference in kind between the police power exercised by Congress in respect of interstate commerce and the police power exercised by it within the District of Columbia. The only difference is found in the subjects of regulation. It has been held that the police power of Congress over the District of Columbia is the same that the State Legislatures have within their several jurisdictions.[4]

As Congress is authorized to legislate upon all matters directly affecting interstate commerce, it has jurisdiction over employers and employes engaged in that commerce, and may exact laws specifying the circumstances in which such an employe may recover against his employer for injuries incurred in his employment, and when and by whom recovery may be had in case such injuries cause the employe's death.

Power over public utilities.—The extent to which any legitimate business is subject to regulation under the police power depends upon the character of the business. A business of a public or quasi-public nature is subject to regulation, different even in kind to that which a private business is.[5]

Being affected with a public interest, having devoted their property to a use in which the public has an interest, thereby rendering their business a public necessity, they must submit to be controlled by the public for the common good.

A distinction must be made between the power of Congress in regard to public utility interstate carriers and the commerce transported by such carriers. The carriers are engaged in a business affected by a public interest; in other words, a quasi-public business. They operate public utilities. It is by reason of this fact that the sovereign power may fix their rates of charge for services. This same fact gives the sovereign power authority to compel the continued operation of such utilities, and not only fix the rates of charge, but also the rate of pay of the employes.

In the opinion of the court upholdling the Adamson law, it was said: "If acts which, if done, would interrupt, if not destroy, interstate commerce, may be, by anticipation, legislatively prevented, by the same token the power to regulate may be exercised to guard against the cessation of interstate commerce threatened by a failure of employers and employes to agree as to the standard of wages, such standard being an essential pre-requisite to the uninterrupted flow of interstate commerce."

(4) Lansburgh v. District of Columbia, 11 App. D. C. 512.

(5) Wyman, Pub. Serv. Corp., § 38.

Here the Chief Justice recounted at length the previously acknowledged powers of Congress to regulate Congress, and said:

"In the presence of this vast body of acknowledged powers, there would seem to be no ground for disputing the power which was exercised in the act which is before us, so as to prescribe before law for the absence of a standard of wages caused by the failure to exercise the private right * * * to the end that no individual dispute or difference might bring ruin to the vast interests concerned. * * * What would be the value of the right to a reasonable rate if all movement in interstate commerce could be stopped as a result of a mere dispute between the parties or their failure to exert a primary private right concerning a matter of interstate commerce; again, what purpose would be subserved by all the regulations established to secure the enjoyment by the public of an efficient and reasonable service if there was no power in Government to prevent all service from being destroyed?

"Further, yet what benefits would flow to society by recognizing the right, because of the public interest, to regulate the relation of employer and employe and of the employes among themselves and to give to the latter peculiar and special rights safeguarding their persons, protecting them in case of accident and giving sufficient remedies for that purpose, if there was no power to remedy a situation created by a dispute between employers and employes as to rate of wages, which if not remedied would leave the public helpless, the whole people ruined and all the homes of the land submitted to a danger of the most serious character."[6]

This decision supports the proposition (about which there was little doubt) that Congress may prevent strikes or any other thing which threatens the interruption of interstate commerce.

The lottery cases.—It has been held that Congress may prohibit lottery tickets being carried in interstate commerce.[7]

(6) Wilson v. New, 243 U. S. 332, 37 Sup. St. 298, 61 L. ed. 755.

(7) Lottery Cases, 188 U. S. 321, 47 L. ed. 492.

If so, it must be because of some authority in Congress over the public morals. It will probably be admitted that Congress is without power to arbitrarily exclude some harmless, legitimate article from commerce among the states. Lottery tickets are generally clean, and not dangerous to public health, life or limb. The only harmful effect they are recognized as having is upon public morals, and it follows that it is because of this fact that Congress assumes to exclude them from interstate commerce. Indeed, the court, in the Lottery Case, cited, said: "As a state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the widespread pestilence of lotteries and to protect the commerce which concerns all the states, may prohibit the carrying of lottery tickets from one state to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those states —perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce."

The court, in the case last cited, also said: "If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by the carrying of lottery tickets from one state to another? In this connection it must not be forgotten that the power of Congress to regulate

commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution."

Child Labor.—The authority of Congress over interstate commerce is as broad as that subject, and also finds its limitations within the boundaries of that subject. In other words, the exercise of the power to regulate interstate commerce must have for its object the protection of a public interest injuriously affected by something by reason of its movement in that commerce.

It is difficult to understand, therefore, on what theory an act of Congress can be valid which prohibits the transportation in interstate commerce of articles, carrying in themselves no inherent evil, merely because the producer of them employed little children in their production, and such work was detrimental to their health and proper development, and, consequently, inimical to the public welfare. The Child Labor Act is thus distinguishable from all other laws respecting interstate commerce. It reaches back and affects the article, or at least its production, before it commences to move in interstate commerce. In fact, children of the prohibited age may not have been employed in the production of the article in question, or even in the mine or factory producing it at the time it was produced, in order that the law may be violated. If they were employed in the mine or factory within 30 days prior to the production or removal of the article to be delivered for shipment in interstate or foreign commerce, the law is violated.

The laws relating to disease infected persons or animals, to lottery tickets, the transportation of women for immoral purposes, etc., relate to things that carry their evil or evil power with them into the commerce, but the Child Labor Act prohibits from such commerce things that are no more evil and have no more power to work evil than any other articles of legitimate commerce. The prohibited articles are inoffensive, and if evil was wrought in their making, it was prior to the time when they became a part of interstate commerce and within the jurisdiction of Congress.

In a case of some value in this connection it was held that a combination simply to control manufacture is not a violation of the Federal Act against combinations in restraint of trade, because such a combination does not directly control or affect interstate commerce, but contracts for the sale and transportation to other states of specific articles are proper subjects for regulation by Congress because they do form part of such commerce.[8]

Several months since the foregoing was written the United States Supreme Court has held that this Act is unconstitutional because, the products of child labor are in themselves inherently harmless, and the Act, instead of being one regulating commerce, which consists of intercourse and traffic and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities, would serve to bring under federal control to the practical exclusion of the authority of the states, all manufacture of articles intended for interstate shipment; and because it is an invasion of the powers of the states, whose inherent power to regulate their own local affairs has never been delegated to the general government.[9]

The White Slave Act.—The so-called White Slave Act forbids the transportation, etc., in interstate commerce of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl," etc.

This Act condemns transportation obtained or aided, or transportation induced, in interstate commerce, for the immoral

(8) Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 240, 42 L. ed. 136.
(9) Hammer v. Dagenhart, 38 Sup. Ct. 529.

purposes mentioned. The intent and purpose of one charged with a violation of this Act is the gist of the offense. It follows, therefore, that one may persuade a woman to go in interstate commerce, and subsequently lead her into a life of debauchery, without violating the Act, if his intention and purpose when she was transported in interstate commerce were not evil. On the other hand, if he induces her to go in interstate commerce with the intent and purpose of leading her into a life of debauchery, the offense is committed, although he never carries into execution his evil intent. It is the intention or purpose—a mere thought, or state of mind—that converts lawful commerce into unlawful commerce. Intent, therefore, is a part of the commerce over which Congress exercises jurisdiction.[10]

Conclusion.—It seems that whatever is done by Congress for the promotion of the public welfare, having for its basis a legitimate regulation of interstate or foreign commerce, is within its constitutional power.

Starting with the assumption that any exercise of congressional power in this respect has a proper connection with interstate or foreign commerce, it is only necessary in order to determine the great length to which the exercise of this power by Congress may extend, to consult the books and decisions showing legitimate instances of its exercise of the various states.

We then find that Congress may establish a standard of purity for milk and cream, butter, and all other articles of food shipped in interstate commerce; that it may prevent persons from traveling in interstate vehicles that have not been licensed to move in such commerce; that it may prescribe equipment for vehicles in interstate commerce, in the interest of the safety of those employed in operating such vehicles and those carried by them; that it may enact laws providing exclusive remedies for employes injured while employed in interstate commerce; that it may prohibit persons traveling in interstate commerce, when the same is in furtherance of some immoral or criminal purpose. Many other instances could be mentioned of legitimate fields for the exercise of this power.

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(10) See Hoke v. United States, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913 E., 905; Athanasaw v. United States, 227 U. S. 326, 33 Sup. Ct. 285, 57 L. ed. 528, Ann. Cas. 1913 E., 911.

SALES—IMPLIED WARRANTY.

WALLACE v. L. D. CLARK & SON et al.

Supreme Court of Oklahoma. May 21, 1918. Rehearing Denied Sept. 5, 1918.

174 Pac. 557.

(Syllabus by the Court.)

Where the law implies a warranty, the acceptance of the goods, with knowledge of the defects, will not bar an action for damages on account of a defect in the quality; but in such a case the warranty will survive the acceptance.

HOOKER, C.: When the transaction involved here transpired, Wallace was a broker in Oklahoma City, and Clark & Son were manufacturers or canners of sardines engaged in business in Maine. In September, 1915, Clark & Son offered in writing to sell Wallace some sardines, as follows:

"Offer one or two mixed cars Keyless Oils, three-quarters mustard, $2 f. o. b. prompt shipment."

And on September 12, 1915, Wallace accepted the offer as follows:

"Eleventh. Ship later part next week Seaboard Rock Island, six hundred fifty oils two hundred three-quarters mustards."

And on September 20, 1915, Wallace requested oils increased 100 and mustards decreased 100. On October 7, 1915, the shipment arrived in Oklahoma City, and Wallace advised defendant in error by wire:

"Mustards satisfactory customers reject oils account too large, don't contain enough oil, only run about four fish to can," etc.

After some correspondence between the parties, wherein Wallace was at all times

objecting to the quality of the oils and demanding a reduction of the price on account thereof, and Clark & Son were contending the shipment was all the market afforded and in every way satisfactory, Clark & Son refused to reduce the price and requested Wallace to divert the shipment, but Wallace declined to do so, and received the shipment by paying the draft to the collecting bank and thereupon he instituted suit against Clark & Son in the justice court and garnished the money in the possession of the collecting bank, and in the petition filed in said action it is alleged:

"That for a valuable consideration the plaintiff purchased of the defendants, L. D. Clark & Son, 750 cases one-fourth oils, Banquet brand sardines, which sardines were to be standard sardines; that when the sardines arrived in Oklahoma City, and were inspected by this plaintiff, they were found not to be up to standard, but that they were of a much inferior grade, the fish large and not the kind that the plaintiff purchased of the defendants, and which defendants were to ship to plaintiff; that the sardines were billed to plaintiff at $2 per case; that the sardines sent to plaintiff being of an inferior grade were not worth more than $1.75 per case, or 25 cents less on each case; that the plaintiff's damage was 25 cents per case on the 750 cases, or the sum of $187.50, for which judgment was prayed."

No answer was filed in the justice court, and on the trial a judgment was rendered therein in favor of plaintiff in error; but an appeal was taken to the district court, where the cause was tried anew upon the same pleadings, and, after the introduction of all the evidence, the court directed a verdict in favor of the defendant in error, from which, after motion for a new trial was duly filed and overruled, the plaintiff in error has appealed to this court.

It is asserted by the defendants in error that the sardines in question were sold by description, subject to inspection, and, being sold by description, the question of warranty does not enter into the contract between the parties, and that, if the sardines as delivered did not comply with the description, it was simply a breach of contract on the part of the seller, and in no state of the case a breach of any warranty.

It is asserted by the defendant in error that the acceptance of these sardines by the plaintiff in error precludes a recovery for any damages by reason of the failure of defendants in error to comply with their contract; or, in other words, that a warranty does not survive the acceptance. With this contention of the defendant in error we are unable to agree.

In North Alaskan Salmon Co. v. Hobbs, Wall & Co., 159 Cal. 380, 113 Pac. 870, 120 Pac. 27, 35 L. R. A. (N. S.) p. 507 (note), it is said:

"The authorities are not in accord on the question whether an implied warranty survives acceptance with knowledge by the purchaser of a breach of the warranty. Aside from New York, the rule generally obtains in most states that an implied warranty, like an express warranty, survives acceptance, even as to known defects, to the extent that the breach may be relied upon as furnishing a basis to recoup or counterclaim damages in an action for the purchase price, or as the basis for an independent action for damages. Frith v. Hollan, 133 Ala. 583 (32 South. 494, 91 Am. St. Rep. 54); Weed v. Dyer, 53 Ark. 155, 13 S. W. 592; * * * Babcock v. Trice, 18 Ill. 420, 68 Am. Dec. 560; Campion v. Marston, 99 Me. 410, 59 Atl. 548; Alabama Steel & Wire Co. v. Symons, 110 Mo. App. 41, 83 S. W. 78; Holloway v. Jacoby, 120 Pa. 583 (15 Atl. 487, 6 Am. St. Rep. 737); Taylor Cotton Seed Oil & Gin Co. v. Pumphrey (Tex.), 32 S. W. 225."

In 35 Cyc. p. 430, it is said:

"It is perhaps the rule in all jurisdictions that a warranty, either express or implied, survives acceptance or retention of the goods as to defects not discoverable on inspection, whether the contract be executed or executory But according to many decisions on an executory contract of sale, where there is an implied warranty, aceptance is a waiver of patent defects. And in most jurisdictions the rule is laid down without qualification that the acceptance or retention of goods sold does not waive a breach of warranty, and that it makes no difference whether the contract of sale is executed or executory, the warranty express or implied, or the defect patent or latent."

See authorities from Arkansas, California, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, Texas, Vermont, Washington, Wisconsin, and other states supporting the rule cited in the notes on page 431 thereof.

In Williston on Sales, p. 846, it is said:

"In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

In commenting upon the above text, the author says:

"This section is not contained in the English act, but section 11 (1) (a) of that act authorizes the buyer to take title to goods which do not comply with the contract, and therefore hold the seller liable in damages. The latter

part of the American section imposes a qualification of the buyer's rights which is justified by business practice and by some decisions as well as by the law on the continent of Europe."

Further the author says:

"Much confusion exists in American law on the right of a buyer who has accepted goods thereafter to sue for damages because of their defective quality, or because of other defects in the seller's performance. The question involved is not peculiar to the law of sales. It arises in every branch of the law of contracts. The problem is simply this: Does one party to a contract who has a right to rescind the contract or refuse to go on with it, and who, nevertheless, allows the party in default to continue with the contract and accepts his defective performance, thereby manifest an agreement that the performance so received shall be taken as full satisfaction of all obligations? In the law of contracts, other than contracts to sell or sales, by the clear weight of authority this question must be answered in the negative. If a party in default on a contract is allowed to continue to perform, this is a waiver of any right of recission or refusal to go on with the contract because of any known default that has already taken place, but the obligation of the party in default is not thereby terminated, nor his liability to pay damages for his insufficient performance. There is no reason why the rule in the law of sales should be different. When insufficient performance is received by the buyer, he should not be debarred from recovering damages because of the insufficiency, unless he has agreed to accept what has been offered him as full satisfaction of all his rights. There seems no ground for saying that the mere fact that he has taken the goods indicates such assent. * * *"

In English v. Spokane Con. Co., 57 Fed. 456, 6 C. C. A. 416, the court said:

"There has been some controversy in the courts as to the right of the purchaser to accept the goods and rely upon the warranty, some of the authorities holding that where the sale is executory, and the goods, upon arrival at the place of delivery, are found upon examination to be unsound, the purchaser must immediately return them to the vendor, or give him notice to take them back, and thereby rescind the contract, or he will be presumed to have acquiesced in the quality of the goods. But the great weight of authority, as well as reason, is now, we think, well settled that, in cases of this kind and character, if the goods upon arrival at the place of delivery are found to be unmerchantable in whole or in part, the vendee has the option either to reject them or receive them and rely upon the warranty; and, if there has been no waiver of the right, he may bring an action against the vendor to recover the damages for a breach of the warranty or set up a counterclaim for such damages in an action brought by the vendor for the purchase price of the goods."

See authorities cited therein.

In Babcock v. Trice, 18 Ill. 421, 68 Am. Dec. 560, the court held:

"He was not bound to refuse to receive the corn because some portion of it was damaged, nor was he bound to return it on discovery of the fact. He might rely upon the warranty. * * *

"It is true that the acceptance of corn under an executory contract, with opportunity of inspection at the time of delivery, without complaint, may raise a presumption that it was of the quality contemplated by the parties; but it will not preclude the parties from showing and setting up the actual defect in quality and setting up the actual defect in quality and condition. * * *"

The court in a number of cases has said that, where a party purchases an article under a certain warranty which is broken, the purchaser has two remedies: (1) He can return the article within a reasonable time after learning of a breach of warranty and sue for the cancellation of the contract; (2) he can retain the article, recover the difference between the actual value of the article at the time of the purchase and what its value would have been if it had been as represented. See Spaulding v. Howard, 51 Okla. 502, 152 Pac. 107.

Under the authorities above cited, we are of the opinion that in this case a warranty implied by law that the goods were merchantable survived the acceptance thereof by the buyer.

NOTE.—*Implied Warranty as or Not Surviving Acceptance of Goods.*—It seems to be that the instant case is in accord with not only the great weight of authority, but with its almost unanimity, to the effect, that in a general sale of goods there is an implied warranty of merchantability and that this warranty survives acceptance of the goods.

But the State of New York, standing almost alone, appears to dissent from this proposition. Thus in an executory sale of personal property, the vendee was held bound to give notice or to offer to return property as not being merchantable, and he has no right to recover damages after acceptance of the property. Reed v. Randall, 29 N. Y. 358, 86 Am. Dec. 305.

The opinion said: "In cases of executory contracts for the sale and delivery of personal property, the remedy of the vendee to recover damages, on the ground that the article furnished does not correspond with the contract, does not survive the acceptance of the property by the vendee after opportunity to ascertain the defect, unless notice has been given to the vendor, or the vendee offers to return the property. The retention of the property by the vendee is an assent on his part that the contract has been performed. * * * He cannot accept the delivery of the property under the contract, retain it after opportunity of ascertaining its quality and recover damages, if it be not of the quality or description called for by such contract."

The opinion states that this principle is well supported by authority. There is cited Hargous v. Stone, 5 N. Y. 73, which holds that where goods were shipped and accepted without being opened, the vendee was at fault in failing to open, examine and act. Otherwise he waived defects of quality.

In Shields v. Pettee, 2 Sand. (N. Y.) 262, buyer, after receiving part of the quantity sold and finding it did not correspond to quality, was not entitled to retain such part and claim damages for non-delivery of the entire quantity. See also Howard v. Hoey, 23 Wend. 350.

But independently of New York cases the opinion cites much English authority. Thus in Fisher v. Samuda, 1 Camp. 190, there was an action to recover for beer and defendant claimed the beer was bad. It was received in May; its quality discovered in July and notice of its quality given in December. Lord Ellenborough said that retention thus long carried presumption of acquiescence in performance.

In Grimaldi v. White, 4 Esp. 95, there was a sale of a picture and it was claimed that it was inferior to the specimen which had been approved. It was held that the contract must be rescinded *in toto*. "The purchaser cannot keep the article received and pay for it at a less price than that charged by the contract."

In Milner v. Tucker, Car. & P. 15, the contract was for a chandelier sufficient to light a certain room. Purchaser kept it six months and then returned it. He was held liable to pay what was charged for it.

In Hopkins v. Appleby, 1 Stark. 477, there was an order and shipment of barilla, it being expressly warranted to be of best quality. The order was given in October and the barilla arrived in December. After discovery of a claimed inferior quality, purchaser continued to use it. Lord Ellenborough said: "When an objection is made to an article of sale, common justice and honesty require that it should be returned at the earliest period, and before the commodity has been so changed as to render it impossible to ascertain by proper tests whether it is of the quality contracted for.

In Bierman v. City Mills Co., 151 N. Y. 482, 45 N. E. 856, 56 Am. St. Rep. 635, it was held, that as to goods manufactured to fill an order, there is no waiver even as to the implied warranty as to defects not discoverable upon inspection. And this principle finds support in Kellogg Bridge Co. v. Hamilton, 110 U. S. 108. See also as confirming the Bierman case that of Wacher v. Talbot, 167 N. Y. 48, 60 N. E. 288, 82 Am. St. Rep. 712.

As supporting the instant case, there is cited an additional case from Alabama, where it was held in a case of implied warranty as to merchantability that the buyer may rescind or accept and bring an action for breach of warranty or recoup his damages in an action for the price. Baer Co. v. Mobile Cooperage & Box Mfg. Co., 159 Ala. 491, 49 So. 92.

In Illinois it was said that acceptance merely raises a presumption in favor of seller, but this is rebuttable. Babcock v. Trice, 18 Ill. 420, 68 Am. Dec. 560.

C.

BOOK REVIEW.

FREUND'S STANDARDS OF LEGISLATION.

This work by Mr. Ernest Freund, of the Chicago University, opens up a new field of inquiry which cannot help but contribute much to the improvement of the chief branch of American jurisprudence, legislation.

It is often said that "this is the day of the reformer," and while this is sometimes said in derision or disgust, it is nevertheless a statement of fact of highest importance with respect to present and future sources of the law. the "latest" statute today is as important as the "latest" case and it is time, therefore, that lawyers and jurists gave more thought to the character and form of legislation than they have in the past.

The author classifies modern legislation so far as its purpose and concept is concerned into five classes: 1, the right of personality; 2, freedom of thought; 3, repression of unthrift and dissipation; 4, protection of public health and safety; 5, social legislation.

In respect of the first four classes, legislation is performing the function assigned to it by the common law courts, to wit, correcting unequalities and unequities in the operation of common law principles. The fifth class of laws—changing social conditions and relationships and giving social relief is in such direct defiance of the individualistic ideals of the common law that it made the courts hesitate in recognizing such legislation as being or not being within the purview of constitutional limitations. The author calls attention to the mistake made by the appellate courts of New York, Illinois and other states in nullifying workmen's compensation laws, minimum wage acts, ten-hour day acts for women, and similar laws. These acts were held unconstitutional under the due process of law clause of state constitutions, which the author states, was not incorporated into our constitutions for "the purpose of fixing economic policies which, however firmly rooted in habits of thought or structure of society, are by their very nature unfit to be identified with the relatively immutable concept of due process."

The author then proceeds under the theme, "tasks and hazards of legislation" to show the conflict between the courts and the legisla-

tures over the new social concept of legislation and the final surrender of the courts of old standards to test such legislation and the erection of new standards which are more elastic than previous definitions of the police power or of due process of law permitted.

The most interesting chapter of this work from the legislator's viewpoint, is that entitled "Constructive Factors." Herein the author calls attention to methods of legislation in other countries which, if adopted here, would have a tendency to improve legislation. One of these is the practice of executive initiative, that is, the practice of requiring that practically all legislation shall originate with the executive and his cabinet or advisers. In England, Germany and France, legislation is drafted by a responsible ministry, the effect of which, says the author, is to "professionalize the function" of legislation. The legislative draftsman, says the author, "will take pride in his business and in course of time will become an expert in it. He learns from experience and traditions will be formed." The author calls attention to the public appreciation of this need in America and the increased executive participation in legislation both national and state. This power of the executive to initiate legislation is worked out, the author suggests, through the right of the executive to suggest the subjects of legislative regulation, and the author asks whether there is any reason "why the executive should not present his recommendations in the form of bills." The author argues that the lack of "initial responsibility" in drafting and presenting bills is responsible for much defective legislation. This leads to the pernicious practice of introducing bills "by request" and "mutual accommodation" of members concerning bills in which each member is particularly interested.

We cannot extend this review further in order to call attention to other valuable suggestions of the author for improving legislative procedure but sufficient has been said to show the novelty and importance of the subject and thorough scholarly discussion of it by the author.

Printed in one volume of 327 pages and published by the University of Chicago Press, Chicago, Ill.

HUMOR OF THE LAW.

"Can any pupil tell where the Declaration of Independence was signed?" asked the teacher of the history class.

"Yes'm, I can," called little Johnnie Baker. "It was signed at the bottom."—Ladies' Home Journal.

The doctor and the lawyer had a difference one evening.

"I tell you," the lawyer later told a clergyman, "doctors are callous brutes, with not a spark of human feeling within them."

"Come, come,' replied the clergyman, trying to calm his friend, "that's rather a sweeping statement, you know."

"Not a bit of it," declared the lawyer. "Why, when I was ill a few weeks ago and suffering untold agonies, I sent for the doctor. 'Doctor,' I moaned, 'I'm suffering the torments of hell.' 'What! Already?' was his unfeeling retort."—Minneapolis Tribune.

Those who would have us believe that President Wilson's notes are not effective should remember the condition of the military powers in Germany today, which is paralleled in a story told of a certain darky who was drafted and sent to the front. In the thick of battle he forgot all he had learned in the training camp, and, throwing down his rifle he attacked the nearest German with his razor. One vigorous, deft slash he made, but the Hun only laughed and said:

"That didn't bother me any."

"Youall just wait 'til you try to turn youah haid," said the darky, as he went after the next one.

Mr. Butterworth, the grocer, was looking over the credit sales slips one day. Suddenly he called to the new clerk:

"Did you give George Callahan credit?"

"Sure," said the clerk. "I—"

"Didn't I tell you to get a report on any and every man asking for credit?"

"Why, I did," retorted the clerk, who was an earnest young fellow. "I did get a report. The agency said he owed money to every grocery in town, and, of course, if his credit was that good I knew that you would like to have him open an account here!"—Rehoboth Herald.

WEEKLY DIGEST.

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

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1. **Attorney and Client**—Trust Fund.—Where general bondholders of canal company, which was controlled by railroad company, recovered against latter and compelled it to pay sum of nearly $2,000,000 for distribution among bondholders, proceeding must be deemed adverse as to railroad company, though it held some bonds of canal company, and in allowing attorney's fees nothing should be charged against bonds held by railroad company.—Brown v. Pennsylvania R. Co., U. S. C. C. A., 250 Fed. 513.

2. **Bankruptcy**—Imputability.—Knowledge of the manager of a corporation that it was indebted, which fact he concealed, held not imputable to the corporation, to render a transfer of its property, in which he had no part, fraudulent, and an act of bankruptcy.—In re M. S. Fersko, Inc., U. S. C. C. A., 250 Fed. 357.

3.——Insurance Policy.—Under Bankruptcy Act, insurance policies on the life of bankrupt, which were fully paid and yielded annual dividends, did not pass to the trustee, where they had all been borrowed upon to their full loan value, and the interest on the loans exceeded the dividends.—In re Williams, U. S. D. C., 250 Fed. 288.

4.——Jurisdiction.—Where administrator of estate filed petition in state court to sell property for payment of debts, and trustee in bankruptcy of one of the heirs entitled to share in the land consented to sale, any question of jurisdiction to enjoin sale became moot, and petition seeking injunction should be dismissed.—Triplehorn v. Cambron, U. S. C. C. A., 250 Fed. 605.

5.——Lien.—Pennsylvania creditor, asserting a lien by virtue of levy under fi. fa. execution eight months previous, cannot sustain the same as against debtor's trustee in bankruptcy, on theory that lien's validity was recognized by Bankruptcy Act, because liens of executions issued within four months' period were avoided, and that trustee succeeded to nothing by provision declaring that he should have rights of execution creditor, etc.—In re Rayford Truck & Tractor Co., U. S. D. C., 250 Fed. 634.

6.——Referee.—Order of referee in bankruptcy, pursuant to petition in the proceeding, that a stockholder of bankrupt pay a certain amount per share, and in default thereof directing suit by trustee, is not void because on order to show cause mailed him, instead of personal service, but, while determinative of amount of debt, and authorizing suit, does not foreclose defenses.—Courtney v. Youngs, Mich., 168 N. W. 441.

7.——Revision of Orders.—Petition to revise is not appropriate remedy to review action of District Court in dismissing rule to show cause why bankrupt should not be adjudged in contempt for failure and refusal to comply with turn-over order, where question involved was purely one of fact.—Galbraith v. Rosenstein, U. S. C. C. A., 250 Fed. 445.

8.——Surety of Bankrupt.—A surety or indorser on the notes of a bankrupt is a "creditor," within the meaning of the Bankruptcy Act.—Cohen v. Goldman, Mass., 250 Fed. 599.

9. **Banks and Banking**—Principal and Agent.—Until some special necessity for action on their part is brought to their attention, directors of a national bank are entitled to rely on the cashier to guard against deficiencies in methods of bookkeeping which would enable subordinate employes to appropriate the bank's funds, and need not interfere independently.—Dresser v. Bates, U. S. C. C. A., 250 Fed. 525.

10. **Bills and Notes**—Circumstantial Evidence.—Where one suing on a note alleged that he was purchaser for value before maturity, without notice, and introduced evidence to so show, verdict should have been directed for plaintiff, where defendant introduced circumstantial evidence of third parties tending to show that someone else claimed the note, after some installments were due, but no direct evidence to that effect.—Barry v. Gregory, S. C., 96 S. E. 371.

11.——Detaching Note.—Indorsee of note, bearing evidence of having been detached from some other paper, who had handled thousands of dollars of such paper payable to the payee, and had trouble with it, had knowledge of facts sufficient to put him upon inquiry and charge him with notice of fraud perpetrated by payee.—Steven v. Venema, Mich., 168 N. W. 531.

12.——Duress.—In suit on note, plea of duress in that company had threatened to prosecute if defendant did not pay over an alleged balance due, not alleging that threat was immediate or urgent, should have been stricken as insufficient.—Sale City Gin & Mfg. Co. v. Dukes, Ga., 96 S. E. 348.

13.——Express Agreement.—A complaint, alleging that defendant executed certain checks for a valuable consideration and delivered them to plaintiff, and that "defendant is indebted to the plaintiff thereon and by reason thereof," is not insufficient as failing to allege a promise to pay; "indebted" being defined as having contracted or incurred a debt, and "indebtedness" being a sum of money due by certain and express agreement.—Merriman v. Swift & Co., Tex., 204 S. W. 775.

14.——Innocent Purchaser.—One paying for negotiable paper with his own note retains character of innocent holder so long as his own note is outstanding and until maturity, and if his note is transferred before maturity to an innocent purchaser for value, he retains that character despite notice of an infirmity in original note.—Simmons v. Hodges, U. S. C. C. A., 250 Fed. 424.

15. **Brokers**—Disclosure of Principal.—Attempt by agent, authorized to find a purchaser for land on certain terms, to purchase land for himself without disclosing himself as purchaser, was within the rule forbidding selling agent to buy for himself, though he was to receive as commission whatever land brought over a fixed sum.—Schuhmacher v. Lebeck, Kan., 173 Pac. 1072.

16.——Sole Agent.—Under a contract constituting a broker the sole selling agent for land and providing for payment of commission "whenever the said property shall be sold" a sale by the owner renders him liable to the broker for the agreed commission.—Stevenson Co. v. Oppenheimer, N. J., 104 Atl. 88.

17. **Building and Loan Associations**—Rescission.—Where the secretary of a savings and loan company fraudulently deceived plaintiff into believing that money paid by him to the bank was a deposit subject to check, and not a contract to purchase stock of the company, as it purported to be on its face, plaintiff was entitled to rescind and recover the deposit.—Wareham v. Eagle Savings & Loan Co., N. Y., 171 N. Y. S. 800.

18. **Carriers of Goods**—Interest of Consignee.—Where calculating machines returned by a prospective purchaser as unsatisfactory were shipped to a consignee as agent of the owner and seller, the consignee had no beneficial interest entitling him to sue carrier for failure to deliver, regardless of whether he was selling on a commission basis or working on a salary.—Adams Express Co. v. White, Md., 104 Atl. 110.

19.——Shortage in Shipment.—Where, in addition to notation of shortage on the original delivery receipt, consignee promptly wrote the carrier a letter reciting the facts, and carrier replied in three days that it could not locate the missing goods, there was sufficient compliance with the bill of lading requirement of claim of loss.—Hyatt Roller Bearing Co. v. Pennsylvania R. C., N. J., 104 Atl. 82.

20. **Charities**—Hospital Not for Profit.—A hospital not run for profit, and which in fact did not make any profits, was not liable to a pay patient for negligence of its employes, where no negligence was shown in employment of incompetent employes.—Burdell v. St. Luke's Hospital, Cal., 172 Pac. 1008.

21. **Chattel Mortgages**—Conditional Sale.—A contract in form a conditional sale, but taken as security merely, and not absolutely reserving title, when not filed with the city clerk, is absolutely void as against the mortgagor's creditors, under Comp. Laws 1915, § 11988.—Young v. Phillips, Mich., 168 N. W. 549.

22. **Constitutional Law**—Impairing Obligation of Contract.—When the Legislature grants a franchise, privilege, or exemption to a corporation, either by special incorporating act or other legislation, followed by action of the corporation in reliance thereon, it constitutes a contract based on valuable consideration, the obligation of which cannot be impaired by subsequent legislation.—People ex rel. New York C. & H. R. R. Co. v. Mealy, N. Y., 120 N. E. 155, 224 N. Y. 187.

23. **Contracts**—Express Promise.—Express promise of telephone company's manager to pay plaintiff hospital for caring for defendant, injured employe of company, being shown no promise implied in law, arises on the part of defendant.—Brightlook Hospital Ass'n v. Garfield, Vt., 104 Atl. 99.

24. **Corporations**—Confession of Judgment.—Bill for rescission or accounting for profits by stockholder, alleging fraudulent confession of judgment by corporation and transfer of its property in satisfaction, and subsequent transfers, though not making ultimate transferree party, will not be dismissed, especially in view of chancery rule 13 (100 Atl. viii) as to determining controversy between parties before court or directing others to be brought in.—Steitz v. Old Dominion Copper Mining & Smelting Co., N. J., 104 Atl. 214.

25.——Subscription to Stock.—When a subscription is made to capital stock, the amount of which is specified in the charter, articles of incorporation, or contract of subscription, and there is nothing disclosing a contrary intention, the subscription is made upon implied condition that whole amount shall be first subscribed before liability accrues.—Enterprise Sheet Metal Works v. Schendel, Mont., 173 Pac. 1059.

26. **Deeds**—Conditional Fee.—Deed conveying premises to be used solely as home for superannuated ministers and their widows, and providing that if property was not used for aforesaid purpose it should revert to grantors, their heirs or assigns, held to convey a conditional or qualified fee with a possibility of reverter absolute until condition broken.—Puffer v. Clark, Mich., 168 N. W. 471.

27. **Domicile**—Infant.—Where a minor, whose parents resided in Pennsylvania, acquired a domicile in New York by reason of an indenture as a servant during minority to a brother living in New York, the death of the brother after the minor had begun suit in the federal court against a Pennsylvania corporation cannot be deemed to have divested the minor of his New York domicile and revived his domicile in Pennsylvania, so as to defeat the jurisdiction of the federal court based on diversity of citizenship.—Delaware, L. & W. R. Co. v. Petrowsky, U. S. C. C. A., 250 Fed. 554.

28. **Electricity**—Where a power company contracted to furnish electricity to platted lands at a certain rate in return for certain easements, and lots were sold subject to such easements, power company, while claiming the benefit of the property rights, easements, and franchise so granted, cannot collect greater rates, although approved by Public Service Commission.—Village of Long Beach v. Long Beach Power Co., N. Y., 171 N. Y. S. 824.

29. **Eminent Domain**—Bisecting Land.—If effect of building levee, which would bisect exceptors' land along river, would be to cause lands between levee and river to be overflowed by flood waters of river more frequently, to a greater depth, and for a longer time, exceptors, in condemnation proceedings by drainage district for right of way for levee, would be entitled to damages therefor, in view of Const. art. 2, § 21, as to "just compensation" for property taken.—Inter-River Drainage Dist. v. Ham, Mo., 204 S. W. 723.

30. **Executors and Administrators**—Evidence.—In action against estate for services rendered deceased, testimony of a witness that he had seen plaintiff go to deceased's house very frequently was admissible; it being claimed that directions were given and part of services were performed at the house.—Raymond v. Sheldon's Estate, Vt., 104 Atl. 106.

31. **Explosives**—Injury to Child.—Where a footpath running across defendant's premises was continuously used by general public and at times by school children, held, defendant was liable for injury to plaintiff child eight years old who stepped from path to defendant's building located from two to four feet from path and procured a dynamite cap which exploded when he got it home; caps being kept in an open box in view of persons using path, and no warning sign being displayed.—Anderson v. Newport Mining Co., Mich., 168 N. W. 523.

32. **Fixtures**—Vendor's Lien.—Such machinery as was attached to land sold, and therefore a fixture, was within effect of vendor's lien; it not appearing that through any agreement between seller and buyer the machinery was to be or remain personalty.—Faulkner v. Fowler, Ala., 79 So. 257.

33. **Frauds, Statute of**—Oral Contract.—Where adopted son permitted father to use his land in consideration of father's contract that all his property should go to the son on his death, such oral contract, father having used son's land until death, was not within statute of frauds.—Bromeling v. Bromeling, Mich., 168 N. W. 431.

34. **Fraudulent Conveyances**—Bulk Sales Act.—The sale of a billiard and pool hall business, including tables, cues, racks, and other usual equipment, is not within the Bulk Sales Law, requiring notice to creditors, etc.; the act being intended to protect creditors selling merchandise for resale.—Independent Breweries Co. v. Lawton, Mo., 204 S. W. 730.

35.——Bulk Sales Act.—The purchaser of merchandise in bulk is not relieved from the duty of notifying the vendor's creditors, under Civ. Code 1910, § 3227, by reason of a verbal notice to such creditors given by the vendor himself.—Moultrie Grocery Co. v. Holmes-Hartsfield Co., Ga., 96 S. E. 346.

36. **Guardian and Ward**—Secret Understanding.—Where a guardian sells land on secret understanding that purchaser shall not pay, but immediately convey to guardian's wife, and sale

is confirmed, there is a fraud on ward's estate, and sale will be set aside as against purchaser and those acquiring rights with notice.—Winsted v. Shank, Okla., 173 Pac. 1041.

37. **Homestead**—Lien.—Where owner of lot not fully paid for contracted for building of house thereon, and subsequently, being unable to meet his payments, had title taken in name of contractor, who subsequently conveyed it to him, retaining a vendor's lien, the homestead right had attached before the transfer, so that as to parties with notice no valid lien could be created to secure the debt.—Martin v. Granger, Tex., 204 S. W. 666.

38. **Husband and Wife**—Gift to Wife.—A husband who purchases a piano has a right to give it to his wife; and, if he does so at the time of the purchase, the piano is hers, and its taking under a judgment against the husband was wrongful.—Le Blanc v. Sayers, Mich., 168 N. W. 445.

39.——Suretyship.—Absence of knowledge or notice on part of or to husband's creditor that indorser of husband's note, pledged as collateral security for debt, is his wife, is ineffectual to avert application of Code 1907, § 4497, providing wife cannot become surety for husband.—Corinth Bank & Trust Co. v. Pride, Ala., 79 So. 255.

40. **Injunction**—Duty of Tenant.—The right of injunction, if it accrued to the complainant landlord, grew out of his duty to maintain an undisturbed, uninterrupted possession in his tenant, freed from the blasting operation of which complaint is made.—Woodstock Operating Corporation v. Quinn, Ala., 79 So. 253.

41.——Trade Secret.—Where complainant had knowledge or the means of knowledge that a competing company, now absorbed by the defendant company, was regularly using a device claimed by complainant as a trade secret, and did not seek to restrain the same for three years, there was such acquiescence as to estop complainant from enjoining defendant.—Globe Ticket Co. v. International Ticket Co., N. J., 104 Atl. 92.

42.——Venue in Divorce.—Husband having sued for divorce in one county was not entitled to injunction restraining the wife from suing for divorce in another county and secreting the children, since the husband could avail himself of such matter in any suit brought by wife.—Lingwiler v. Lingwiler, Tex., 204 S. W. 785.

43. **Insurance**—Liability Insurance.—Where employer, applying for employers' liability insurance, was advised by insurer's authorized general agent that insurer would "cover" him, he was insured against liability for accidents to his employes for a time at least; for by the term "cover" it was intended that the company would protect the applicant and insure him against liability to his employes for all injuries they might sustain which were caused by the usual and ordinary risks of the business named in the application, unless and until the company notified him that it declined to underwrite them.—Barrette v. Casualty Co. of America, N. H., 104 Atl. 126.

44.——Policy Covering Loss.—Policy against liability imposed by law on insured, contractor for carpentry and mason work on telephone company's building, and resulting from negligence of contractor or subcontractor engaged in work, did not cover accident to passenger in street through negligence of employe of independent contractor.—Wilson v. London Guarantee & Accident Co., Cal., 173 Pac. 1006.

45.——Sole and Unconditional Ownership.—Where wife had legal title to property, an insurance company cannot assert that she was not the "sole and unconditional owner of the property" merely because the property was bought with community funds.—Germania Fire Ins. Co. of New York v. Bally, Ariz., 173 Pac. 1052.

46.——Suspension of Member.—Where plea of a benefit society stated its member took chloral hydrate or a narcotic merely as medicine, not charging he had the drug habit, which under the constitution and by-laws was cause for suspension or denial of reinstatement, the beneficiary's demurrer to plea was properly sustained.—Eminent Household of Columbia Woodmen v. Ramsey, Miss., 79 So. 351.

47.——Tontine Policy.—Where holder of tontine policy, the accumulation period of which expired on November 16th, and which called for payment of death benefit if he died before such date, died at 4 a. m. on such date, his estate could recover only the cash surrender value, which he had elected, on October 27th, to receive, and which would have been payable on November 16th, and not the death benefit.—New York Life Ins. Co. v. Reese, Ala., 79 So. 245.

48.——Waiver.—Where holder of accident policy, not authorizing delayed payments, customarily paid at dates subsequent to those specified, the acceptance of a payment after due and after an injury to the holder was a waiver, and the holder could recover on the policy, having paid the last amount, not as reinstatement, but as dues in regular order.—Hawkins v. Woodmen Accident Ass'n, Mo., 204 S. W. 566.

49. **Intoxicating Liquors**—Illegality.—A contract leasing a hotel with a provision that the lessees shall act as managers of the lessor's bar therein, for which service they shall be paid such share of the profits as the parties may thereafter agree upon, lessee to pay all bills of the saloon from the income and to purchase liquor in lessor's name, is not illegal on its face as an attempt to transfer the liquor license.—Hanley v. Gowan, Mich., 168 N. W. 459.

50. **Landlord and Tenant**—Crop Contract.—Where tenant set up share-cropping contract, and alleged that landlord and a third person conspired to oust him of the crop, it was not error to award him as damages the value of his share of the crop, without deducting the cost of harvesting, since a conspiracy includes a corrupt motive for which penalty may be inflicted.—Stewart v. Patterson, Tex., 204 S. W. 768.

51. **Libel and Slander**—Charge of Professional Ignorance.—Although words which charge a professional man with unskillfulness in performance of a particular act of his profession are not libelous per se, yet where the specific act charged is of such a character that its performance of necessity involves general professional ignorance, want of skill, of carelessness, the words are necessarily actionable.—Vosbury v. Utica Daily Press Co., N. Y., 171 N. Y. S. 827.

52. **Master and Servant**—Assumption of Risk.—St. 1909, c. 363, abolishing defense of accumption of risk where reported defect is not remedied, did not require employer to keep ways, works, and machinery in condition not contemplated when contract of employment began, not referring to conditions assumed by employe at the time of contract of employment, where there was no duty to change them or make them safer at common law or under Employer's Liability Act.—Wood v. Danas, Mass., 120 N. E. 159.

53.——Evidence.—In action for injuries when section hand was drawn under wheels of motor car, derailing the car and injuring other servants, evidence that the company had other cars with smaller wheels, which would not draw men under them, was competent, not to show custom, but to show the company's knowledge that the car in question was not reasonably safe.—Rockwell v. Hustis, N. H., 104 Atl. 127.

54.——Signaling.—Plaintiff, helping to place defendant's cars in the barn, after getting down into a narrow space behind the car and replacing a trolley, was injured by the motorman backing the car. Held that, in view of testimony that in such cases the motorman should not start the car until signaled, the plaintiff made a case for the jury.—Raber v. Kansas City Rys. Co., Mo., 204 S. W. 739.

55.——Trackwalker.—It is the duty of a trackwalker to look out for trains, and not the duty of the trainmen to look out for him.—Rigley v. Wabash Ry. Co., Mo., 204 S. W. 737.

56.——Workmen's Compensation Act.—Where district school-teacher was criminally assaulted and shot by unknown man on her way from school, her injuries were not caused by "accident arising out of employment," and were not compensable under Workmen's Compensation Act.—State v. District Court of Itasca County, Minn., 168 N. W. 555.

57. **Municipal Corporations**—Protest Against Assessment.—Under Code 1907, §§ 1381, 1394, where crude written protest against assessment

for extension of city's sewer system was filed by property owner, which protest showed owner objected because property would not be benefited, etc., circuit court improperly, on city's motion, dismissed his appeal from the assessment.—Wallace v. City of Florence, Ala., 79 So. 267.

58.——Right of Way.—Right of automobile driver who has right of way is not exclusive, but at all times relative, and subject to fundamental common-law doctrine that he must use his right so as not to injure another.—Paulsen v. Klinge, N. J., 104 Atl. 95.

59.——Surrender of Franchise.—The Legislature has the power to consent to the surrender of a franchise granted by a city to a street railway without the approval of the city.—State v. Lewis, Ind., 120 N. E. 129.

60.——Traffic Act.—Where an automobile at an intersecting street collided with a motorcycle coming in an opposite direction, that the automobile driver failed to observe traffic act, does not per se authorize direction of verdict against defendant.—Winch v. Johnson, N. J., 104 Atl. 81.

61.—Warning.—Where city authorized railroad contractors, building a viaduct to carry street over tracks, to use part of street for storing materials, the city was not thereby absolved from liability to pedestrian, injured by defect in sidewalk outside fence barring the street, and between it and a warning sign placed by the contractors.—Gilbane v. Lent, R. I., 104 Atl. 77.

62. **Physicians and Surgeons**—Warning to Patient.—Where a physician not only fails to warn of dangers of a certain treatment, but gives positive assurance of a cure thereby, he is liable for harmful consequences of the treatment where, if such warning had been given, the patient would not have taken the treatment.—Hunter v. Burroughs, Va., 96 S. E. 360.

63. **Railroads**—Invitee.—Where an interurban railroad company built a culvert under a highway and leased 10 acres of land at one side of it to enable travelers to pass around the obstruction created by the construction of the culvert, a traveler injured by being thrown from his wagon on account of a hole in the temporary road over such leased property was an implied invitee.—Brown v. Michigan Ry. Co., Mich., 168 N. W. 419.

64.—— Public Footpath. — Where railroad knowingly acquiesces in public's use of a footpath along its right of way, it must anticipate that persons are apt to be using the path and should be on the lookout for them and exercise all ordinary and reasonable care to avoid injuring them.—Georgia, F. A. Ry. Co. v. Cox, Fla., 79 So. 276.

65.——Swinging Car Door.—In suit for personal injuries to pedestrian, struck by swinging door on passing train, testimony for plaintiff that witness had seen loose and swinging car doors at other times and on other cars was admissible, to show that it was not unusual or improbable for a car door to be loose and swinging.—Lancaster v. State, Tex., 204 S. W. 772.

66. **Religious Societies**—Rights of Minority. —In suit for injunction by majority representing Princeton Baptist church and entitled to relief prayed, a certain of minority being still in good standing, it was error on their cross-petition to enjoin minister called by majority from presiding over conferences and to enjoin majority. —Tucker v. Paulk, Ga., 96 S. E. 339.

67. **Sales**—Estoppel.—That defendant after having received and tested first two barrels of whiskey ordered two more would not estop him from repudiating sale, if last barrels were ordered for purpose of regaining what defendant claimed was fraudulently obtained from him in excess of price of first two barrels.—Block v. Taylor, Mich., 168 N. W. 536.

68.——Express Warranty.—Written contract for sale of a monument for the dead, providing it should be sound and free from cracks, carried an express warranty against specific defects, and was not a mere description of the monument to be furnished.—Globe Granite Co. v. Clements, Vt., 104 Atl. 104.

69.——Food for Consumption.—Where food is ordered in a hotel restaurant, the hotel keeper, if the food is prepared by him, implied warrants that it is wholesome; the transaction being a sale and delivery by the hotel keeper and a corresponding purchase by guest.—Barrington v. Hotel Astor, N. Y., 171 N. Y. S. 840.

70.——Mistake.—Where buyer of goods to be delivered throughout a fall merely through a mistake as to goods tendered being intended for him did not receive them, the seller would not be free from liability upon whole or any part of its contract.—Walker-Smith Co. v. Bilao, Tex., 204 S. W. 777.

71.——Vesting Title.—Under contract for purchase of cattle providing that, if any cattle of a certain brand were thereafter found, they were to be placed in buyer's brand and that he should account to seller therefor, title would not pass to buyer until he had obtained possession of any such cattle.—Gomez v. State, Tex., 204 S. W. 638.

72. **Specific Performance**—Part Performance. —Where defendant agreed to purchase a house, permitting his daughter to occupy it, on payment of interest, taxes, insurance, and repairs, and to execute deed to be placed in escrow deliverable on his death, and the daughter was in possession of the premises for six years, and expended several hundred dollars for repairs, and otherwise performed the agreement, there was such part performance as to warrant specific performance of the contract.—Fowler v. Isbell, Mich., 168 N. W. 414.

73.——Remainderman.—Since, where remainderman and life tenant contract to convey land as an entirety jointly, remaindermen cannot compel vendee to specifically perform by purchasing remainder interest only, vendee cannot compel remaindermen to specifically perform contract by conveying remainder only.—Leathers v. Deloach, Tenn., 204 S. W. 633.

74. **Street Railroads**—Wantonness.—Motorman's conduct in not stopping car before it reached a crossing over which automobile was passing is not wanton where he did not discover automobile until he was within 90 feet of the crossing and car was going 25 miles an hour.—Calvert v. Detroit United Ry., Mich., 168 N. W. 508.

75. **Trusts**—Artifice and Fraud.—Where vice-president of company possessed himself of shares of stock of a third person by fraudulent artifice, the constructive trust which arose would follow the stock into the hands of one not a bona fide purchaser.—Nesbitt v. Onaway-Alpena Telephone Co., Mich., 168 N. W. 519.

76.——Confidential Relation.—If a grantee by means of a parol promise to reconvey obtains an absolute deed without consideration from one to whom he stands in a confidential relation, the breach of the promise is constructive fraud, although at the time it was made there was no intention not to perform.—Bradley Co. v. Bradley, Cal., 173 Pac. 1011.

77.——Legal Title.—Where land is conveyed to trustees who were directed to pay the net rents to the beneficiary, and who, as trustees, were required to collect rent, attend to taxes, insurance, repairs, and make permanent improvements in connection with care of five or six warehouses, the legal title vested in trustees, and will not be transferred to beneficiary; such having been intention of grantor.—American Colonization Soc. v. Latrobe, Md., 104 Atl. 120.

78. **Vendor and Purchaser**—Constructive Notice.—Where a church was given deed for 3 acres out of a 40-acre tract, but deed described wrong 40 acres, a purchaser of the 40 acres containing the 3 acres which the church understood it had bought and on which it had built its church had sufficient constructive notice to put him upon inquiry as to extent of possession claimed by church.—Hargis v. Lawrence, Ark., 204 S. W. 755.

79. **Wills**—Intestacy.—Where a will, consisting of six paragraphs, after disposing of the residuary estate, provided that "from all the provisions of the preceding clauses I except my interest in" a certain newspaper, etc., decedent died intestate as to his interest in such newspaper.—Kempson v. Kempson, N. J., 104 Atl. 86.